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In the Supreme Court of the United States.

OCTOBER TERM, 1913.

WASHINGTON SECURITIES CO., appellant, *v.* THE UNITED STATES. } No. 367.

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal from a decree of the Circuit Court of Appeals affirming a decree of the Circuit Court which set aside four patents issued under the homestead law, and quieted the Government's title to the land against the claim of the appellant, which had purchased from the patentees. (R., 187.)

The lower courts united in finding from the evidence that the land was chiefly valuable for its coal deposits; that this fact was known at, and long before, the time of entry; that the patents were procured by false and fraudulent representations to the

contrary; and that the defendant was charged with notice of the fraud when it purchased and therefore could not claim the status of a *bona fide* purchaser.

For the opinion of the Circuit Court see R., 185. For that of the Circuit Court of Appeals, see R., 200, and 194 Fed., 59.

The land in controversy is section 34 of township 22 north of range 7 east of the Willamette meridian. The particulars of the entries, patents, and subsequent conveyances are as follows:

> East half of the east half of the section; entered by Turner September 10, 1900; final commutation proof and entry at the local land office January 9, 1902; patented November 2, 1904; afterwards conveyed by Turner and wife to C. J. Smith as the agent of the defendant, and by Smith to the defendant.
>
> West half of the east half of the section; entered by Forsyth June 20, 1901; final commutation proof and entry at the local land office November 25–27, 1903; patented August 3, 1904; afterwards conveyed by Forsyth and wife to C. J. Smith as the defendant's agent, and by Smith to the defendant.
>
> The northwest quarter of the section; entered by Olsen August 5, 1901; final commutation proof and entry at the local land office May 6, 1903; patented November 1, 1904; thereafter conveyed in part by Olsen to Spaight, and thereafter conveyed in whole by Olsen, Spaight, and Spaight's wife to C. J. Smith as the defendant's agent, and by Smith to the defendant.

The southwest quarter of the section; entered by Barbee December 31, 1902; final commutation proof and entry at the local land office March 30, 1904; patented December 12, 1904; thereafter conveyed by Barbee and wife to C. J. Smith as the defendant's agent, and by Smith to the defendant.

The purchases by Smith for the defendant occurred in 1906. (R., 116.)

The bill (R., 2 *et seq.*) alleges, the answer (R., 9 *et seq.*) admits, and the land office records show specifically (R., 126, 138, 152, 165), that each of the entrymen supported his initial entry by making and filing a nonmineral affidavit, in the usual form required by the regulations, representing, among other things, that he was well acquainted with the character of the land and with each and every legal subdivision thereof, having frequently passed over the same; that his personal knowledge of the land was such as to enable him to testify understandingly with regard thereto; that there was not, to his knowledge, within the limits thereof any deposit of coal; that it was essentially nonmineral land, and that his application was not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing the tract for agricultural purposes.

In like manner it is alleged, admitted, and proven that each entryman gave sworn testimony and made and filed affidavits at final proof, in which he stated not only that the land was most valuable for agri-

cultural purposes, but also there were not, to his knowledge, any deposits of coal within it, and positively that there were no indications of coal upon it. See the nonmineral affidavits filed at final proof. (R., 130, 141, 156, 168.)

In the "Homestead proofs," or depositions, the entrymen and their witnesses (two in each case, or eight in all) were all asked this question:

> Question 10. Are there any indications of coal, salines, or minerals of any kind on the homestead? If so, describe what they are and state whether the land is more valuable for agricultural than for mineral purposes.

The answers were, "None" or (literally or in substance) "None to my knowledge." (R., 131, 132, 134, 143, 145, 146, 158, 159, 161, 171, 172, 173.) Turner said, "Not any" (R., 173); Forsyth, "I have made an effort to determine as to minerals and coal *and have found none.*" (R., 146.)

It will be borne in mind that each witness and claimant also stated that he was well acquainted with the land to which his testimony related.

Now, in contrast with all these assurances, by affidavit and deposition, upon the faith of which the entries and patents were allowed, the bill avers that the land was known to be chiefly valuable for coal at the time of entry; that each of the entrymen was aware of the fact and that his evidence to the contrary was false and given for the purpose of defrauding the United States; and the answer, while denying

the fraud, concedes (R., 9) "That said land contained [i. e., at time of entry] and still contains valuable workable deposits of coal." The Government produced a dozen witnesses, most of whom had long been familiar with the land, and some of whom were acquainted with the entrymen and their history, the result of whose testimony was to demonstrate that the land was chiefly valuable for coal, that this was generally known since a time far anterior to the entries and must have been known to the entrymen when they made their affidavits and depositions. Indeed, the facts thus established, joined with the other circumstances of the case, compel the inference that the coal furnished the incentive for the entries. The defendant, on the other hand, made practically no attempt to dispute this showing beyond some testimony to prove that the land had some value for agriculture and timber. It neither called, nor explained its failure to call, the four entrymen and their final-proof witnesses. The defendant bought the land as coal land, relying upon the report of a mining engineer named Hawkins, who had first examined the tract (R., 100, 119); but, although he was apparently obtainable as a witness (R., 122), this expert was not called, nor was his report produced, nor was any reason vouchsafed for these omissions. The theory of *bona fide* purchase is evidently the main reliance of the defense; but before coming to that we will go more fully into the facts concerning the land and the patents.

Review of the evidence upon the character of the land and the fraud in the entries.

The witness Whitworth (R., 77), a civil engineer of long experience in mining and prospecting for coal, testified that, in company with others, he discovered the coal in April, 1882, at the south quarter corner of the section. He and other persons associated with him opened up the cropping there, traced it a short distance east and west, and drove a slope and a drift in the coal at a place some 800 feet east of the quarter corner and about 400 feet north of the south line of the section. These workings were on the land afterwards entered by Forsyth. (See sketch map, Exhibit E, R., 179), and close to the west line of the Turner tract. Another vein was opened near the west quarter corner, on the Barbee tract (R., 79, and Exhibit E), and a tunnel was driven there for about 150 feet. A vein was also found on section 33, near the northwest corner of section 34, striking almost directly toward that section (south 65° east), and upon that vein two tunnels were driven, so that the coal was followed to a point 60 feet from the section line (R., 79, 80) next to the Olsen tract. The vein first discovered (in the southeast quarter of section 34) was of a strong bituminous coal (R., 80) over 12 feet thick at the place of discovery and 8 feet thick at the tunnel and slope (R., 97); that found near the west line in section 33 was semibituminous (R., 80), over 6 feet thick, with a barren streak of 6

inches (R., 97). All the veins were regular as far as traced, comparatively free of foreign matter (R., 97), and the coal merchantable in both quality and quantity (R., 81), and, in the opinion of this witness, all divisions of the section were more valuable for coal than for anything else (R., 81), though it has some agricultural value (R., 80). He and his associates, as a result of their examinations, were very sure that the coal existed in the east half of the east half (the Turner tract), and the northwest quarter (the Olsen tract), though their actual workings, uncovering the veins within the section, were confined to the west half of the east half (the Forsyth tract) and the southwest quarter (the Barbee tract).

Their operations extended through many years and entailed an expense of $8,000, their purpose being to develop and hold the land for subsequent purchase under the coal-land law. Most of the work was done before the township was surveyed, and (afterward, doubtless) filings were made upon the land (declaratory statements) to hold the coal. About the year 1884, as the result of difficulties and litigation with the Oregon Improvement Co., during which Whitworth's men were ousted of possession and again reinstated, one John L. Howard was inducted into the Whitworth association, through a compromise arrangement, under which Howard was to represent a one-third interest and defray an equivalent part of the expenses. The chief business of the Oregon Im-

provement Co., according to the testimony of the witness, C. J. Smith (R., 99), who was formerly its manager, was "railroad, steamship, and coal." It owned the Franklin and Newcastle coal mines (the former situate in the immediate vicinity of section 34) and a railroad running to them. (R., 99.) This company, through Howard, continued in the "association" with Whitworth, Maguire, Smithers, and Colman until at least as late as 1897, if not longer (R., 97, Complainant's Exhibits F to J; R., 180–184), paying its share of the expenses for work and "refiling." (R., 183.) Very soon after the homestead entries had been filed, Whitworth and one Sidney Williams went upon the land to continue their prospecting. Whitworth testifies (R., 82) that he set some men at work near the east line of section 34. Turner and Forsyth appeared with firearms and ordered them to stop, threatening to shoot the first man who crossed the line.

> Q. What was the conversation as near as you can remember it?
>
> A. Well, I told them that of course I was satisfied the coal went through there and I wanted to find it, and that we were interested in coal and wanted to show it up on that portion of the section. I said to Mr. Forsyth, "Of course, if we are allowed to go over on the west half of the east half it will be a very small matter to trace the coal down and show it on the east half of the east half," but he said he would not allow us to go. (R., 83.)

The tunnel on the Forsyth tract, 8 feet high by 6 feet wide, was still open a short time before. It was not concealed. Both Turner and Forsyth were miners. The workmen were then taken to the Olsen tract and set to work "tracing the vein on 33 across onto 34." They were notified to quit. The section had been generally known in its vicinity as coal land ever since the first discovery of coal—"I think by everyone that has any knowledge of coal, of King or Pierce County." It has the reputation of being good coal land. (R., 84.)

The witness Sidney J. Williams (R., 49) was very familiar with section 34, having visited it every year during 20 years last passed, except the last four or five, when he went there but twice. He confirmed the existence of the tunnels and the good quality of the coal.

> Any man that has ever been in that country—in that coal belt there, and been around those coal mines and been there, would know that it was coal land. (R., 54.)
>
> I have been going upon that section ever since I was about nine years old * * * and I have been going into those tunnels and seen the croppings all over it, so naturally when I go there all I can see is coal. (*Ib.*)

The section is about 4 miles from Franklin and the same distance from Palmer—places near which there were coal mines. Williams knew both Turner and Forsyth, the former for 20 years. Turner was at one time a clerk in the store of the Oregon Im-

provement Co. at Franklin, and afterwards ran a store of his own at Palmer. Forsyth he knew as a miner working in the Burnet Mine near South Prairie. (R., 52.) Immediately after the initial homestead entries were made, Williams, with one Julius Klinker, went upon the eastern part of the section.

> I went on to go on to the tunnel and I met Mr. Forsyth and he told me not to come any further, and I told him I was going to the tunnel. He says, "You can't go to the tunnel," he says, "if you go any further I will shoot you." He had a gun in his hand at the time, and I kept on walking towards him, and he told me not to come any further, he would shoot me. So then I went back off the section.
>
> Q. Did you tell him for what purpose you wanted to go on the land?
>
> A. I came there to go where the coal was, the tunnel.
>
> Q. Did he say anything about the coal?
>
> A. He told me he would not let me go there. (R., 51.)

Upon cross-examination (R., 52) it appeared that Williams's purpose was to make a coal filing on the tract in the east half of the section where the tunnel and slope were, which had been covered by the Forsyth entry. He actually attempted such a filing very soon after the homesteads were filed, and offered to pay the coal-land price for 160 acres ($3,200) at the local land office, but the offer was refused and the filing rejected. See R., 53.

Q. Did you keep your filing good?

A. Yes, sir; I made a tender of the $3,200 to the land office.

Q. Then you contested their filing, did you?

A. No; it didn't go any further. They refused to accept my money; the land office held it was more valuable for other purposes, and gave me back my money.

Q. And what, if any, showing did you make to substantiate your filing?

A. I made the same talk I have made here about the coal being there.

Q. In what way did you make that showing?

A. I had witnesses.

Q. That was before the office here?

A. Yes, sir.

Q. And, as the result of that showing, they refused to accept your tender?

A. Returned——

Q. (Interrupting.) And turned down your filing?

A. Yes, sir.

This matter is further explained in Williams's redirect and recross-examination (R., 59):

Q. Did I understand you to say that you contested Forsyth's homestead entry or he contested your coal entry?

A. He contested the coal entry.

Q. Did you have a hearing before the land office?

A. No, sir.

Q. Was any evidence introduced?

A. No, sir.

Q. Why not?

A. The matter was dropped; they refused to accept it.

Q. They refused to give you any hearing?

A. Yes, just refused to accept the money and just tendered it back; that is as near as I can remember; that is all that was done.

Q. Was there no hearing before the land office?

A. No; no hearing.

Q. No witnesses examined?

A. No sir.

Recross-examination:

Q. What did you mean, Mr. Williams, when you said you had witnesses to make the showing?

A. I went down there—when I went down to make my filing—took the witnesses over to prove that I had been on the land and over the land, made a tender of the money and they tendered back the money to me, refused to accept it, stating that there had been a contest filed.

Q. That there had been what?

A. A contest filed, and they handed me it back. That is as far as I went with it. I don't know just exactly who was with me at that time.

Q. Well, you did not contest it then?

A. No, sir.

Q. You just dropped out of it?

A. I just let the matter drop.

Julius Klinker (R., 59), a man of experience in coal mines and property, went all over the section, prospecting it for the Northern Pacific in 1898.

He found good commercial coal actually exposed on all subdivisions except the east half of the east half. Four veins were already opened, two by tunnels and two by slighter excavations, and he found four more. He continued at the work for four or five months (R., 66), driving tunnels into Sugar Loaf Mountain, which, as the testimony generally shows, is a hill of five or six hundred feet altitude, situate at about the center of the section and sloping down over a good part of it. Two other men worked with him. (R., 61.) Everyone in the vicinity knew it to be coal land. (R., 67.) Has known Turner twelve or fourteen years (R., 62); he ran stores in near-by mining towns. The witness corroborates Williams's statement that Forsyth put them off with a gun. Olsen always worked at Black Diamond. Barbee had worked at drilling for coal. (R., 63.)

Patrick Walsh (R., 67) formerly worked in the coal mines at Renton, Black Diamond, Franklin, and Newcastle. First visited section 34 in 1886, passing over the trail which traverses the southeast and southwest quarters. At that time there was a tunnel and a slope. The coal was visible on the trail. He knew of four veins—the one in the tunnel, one farther north, and two on the trail besides. Two had been explored at the surface only. Turner was clerking in Franklin store. Thomas Spaight (Olsen's first grantee?) was working at butchering at Black Diamond for the Black Diamond Coal Co.

John J. Fraser (R., 69), a coal miner, had worked in mines at Kangley and Durham, Franklin, Lawson, and Black Diamond, in the vicinity of this section. He first worked on the section about 23 years ago—i. e., 1886. Four or five persons (Jim Maguire, Fred Hansen, and others) were there then sinking a slope in the southeast quarter, taking out the coal and dumping it. It was good coal—a considerable quantity of it was used at Durham—tons of it were burned at Maguire's saloon there. They packed it home in sacks and burned it during the winter. In 1893 this witness did some work driving a tunnel and taking out coal on the northwest quarter for Maguire who "was holding this section." He remembers a slope and tunnel in the southeast quarter, a tunnel on the southwest quarter, and one on, or just on the edge of, the northwest quarter. These were all partly driven in 1885 when he first went over the trail. After Durham "opened up," in 1888, the land was generally spoken of as coal land, and many went to see it but it was then unsurveyed. Durham is in section 2 of the next township south—that is a section whose northwest corner is coincident with the southeast corner of section 34. The Alta mine, in which the witness worked and on which there was a good showing of coal, is only three-fourths of a mile from section 34. There was also a good showing in the Kangley.

Turner lived in Franklin and Palmer for the last 18 or 19 years. Barbee came to Ravensdale in 1900, where he did carpenter work, framing timber for the

mine there, building chutes, fixing cars, etc. Olsen worked in the Kangley mine in 1893, and afterwards at Lawson, where a new mine was opened near the Diamond. He was a miner. Forsyth "most of the time during the time he made his homestead entry" was at the Barnett coal mine, South Prairie. R., 72:

> Q. Did you ever have any conversation with any of these homesteaders with regard to being a witness for them on their homestead entries?
>
> A. No. Mr. Barbee asked me once in Ravensdale if I would and I stated to him this way, that I could not see my way clear to do it.
>
> Q. Did you state why you could not see your way clear?
>
> A. Well, I did state to him that the coal was visible and that there was considerable of tons of coal out on the dump there, all piled in sight; that it didn't look very good for a man to go and testify as a homesteader.

T. B. Corey (R., 13), a "coal-mining man" for 20 years and superintendent of the Oregon Improvement Co.'s mines in 1890, went to section 34 in that year, at the request of one H. W. McNeal [McNeill, see R., 182], who was then resident manager of the company and whose immediate successor as such was C. J. Smith. Corey made a written report on the land which was turned over to McNeill. He found a tunnel driven 50 feet on a vein of 6 feet of good coal, which he thinks was in the southwest quarter; also a slope which was full of water. (R., 16.) Apparently

he did not go any farther, but from what he saw and from consultations with one Williams and a chief mine inspector, who were better informed, he drew the conclusion that three-fourths of the land was good coal land. This witness then had charge of the Franklin mine in that vicinity. The Kangley and Durham mines were on adjoining sections. He considered section 34 better coal land than section 26, on which the Kangley mine was being operated at that time. He had heard of section 34 as coal land for probably a year before his visit and thinks it was generally known as such. (R., 16.)

Samuel Starkey (R., 20), a coal miner all his life, had lived at Durham (adjoining sec. 34), 20 years, and had worked in the Newcastle, Black Diamond, Durham, and Occidental mines in that county. Worked on section 34 twenty-four years ago. It is rough, very rough in parts—a "regular mountain," called Sugar Loaf, five or six hundred feet high. Most of the southeast quarter is pretty level. "As I told Mr. Smith, I would not give $10 for anything only for the coal and the timber that was on it." There is much small timber suitable for poles and lagging. Sugar Loaf Mountain is gravelly and in parts rocky. He worked on the tunnel and slope in the southeast quarter. The tunnel is about 50 feet long. There are coal outcroppings near the south line. The land is coal land and he has known this ever since he worked on it. "I really believe there is not a man living in 10 miles of that place but what knew it was coal land at that time"—24 years ago. (R., 23.) Black Dia-

mond is 7 miles away; Franklin and Lawson 5 or 6. He did the work for Mr. Williams who was superintendent of the Newcastle mine at the time, in 1885. The tunnel was already driven in some distance. He worked on it for about six weeks. Coal had already been opened up on the Barbee tract. During the past 15 years Turner lived first at Kanasket, a little over a mile from section 34; then for a number of years at Palmer, two miles and a half from it. Previously he had lived at Franklin, working in the mine and store. R., 25:

> Q. Did you ever talk over the character of this land with him, about the time he made the homestead entry?
>
> A. Yes.
>
> Q. What was the nature of your conversation?
>
> A. I told him he would "never get it because" I said, "it is coal land."

He became acquainted with Forsyth just before he came to take up his homestead. R., 26:

> A. Mr. Forsyth came to my house and he told me that Mr. Burdett—Charlie Burdett, from South Prairie—had sent him up to do some work, and he wanted to know if he could board there. I says, "Certainly," I says, "I am awful glad that you are going to do some mining work." And he boarded with me until he fixed the cabin up—the old cabin—he boarded with me until he fixed the cabin up, and then when he left I found that he came up there to homestead it. So I asked

him, I says, "Why did you lie to me when you came up and told me you were sent up here to do some work on this property for the coal?" "Why," he says, "I told you that," he says, "because if I had told you I was going to homestead it you would not have me to board."

Q. Where did he tell you he was going to do work on the coal, on that section?

A. Section 34.

Q. For whom?

A. He said Charlie Burdett had sent him from South Prairie.

Q. Did he tell you what the work was to be that he was going to do there?

A. Well, he said—Well, I understood him to mean that he was going to work—to do some work with the coal mine, he said.

Q. Did you ever have any other conversation with him relative to the character of this land?

A. Oh, when I found out what he was doing, I was done with him.

Q. What was Forsyth's business around there prior to the time that he went upon this homestead?

A. He used to come up there and fish, to fish in Green River, occasionally.

Q. Do you know whether he has ever worked as a miner?

A. Oh, yes.

Q. Where?

A. I believe he worked at South Prairie, Roslyn.

Olsen had been a coal miner for 15 years. He lived and worked as a miner at Kangley on a section adjoining 34.

Barbee was working as a carpenter and miner at Ravensdale, 5 miles away.

R., 27:

> Q. Did you ever have any conversation with Barbee relative to the coal character of this land?
>
> A. Yes, sir.
>
> Q. When was that?
>
> A. When he came up there to live; I tried to persuade him not to go on it.
>
> Q. What did you tell him?
>
> A. I told him, I says, "Barbee, it is coal land." "Well," he says, "if I can get a filing on it, it will be all right, won't it?"
>
> Q. What did you tell him?
>
> A. "Well," I says, "you will have trouble, sure."

F. G. Smithers (R., 37) first went upon the section in 1883 or 1884, and went upon it frequently thereafter "until about 20 years ago"—1889. "Some places all over the section you might raise a little on. I would not consider it agricultural land at all," there not being enough land in one body suitable for agriculture. He knew of the slope, and 20 years ago saw the coal taken from it used as fuel. Turner lived at Newcastle, and later worked in the Oregon Improvement Co.'s store at the Franklin mine, 6 or 8 miles from section 34. The section was generally known as coal land even as far as Newcastle, 30 miles

off. Smithers filed on a part of the section once, but let the filing drop for financial reasons.

Daniel Boyle (R., 40), a coal miner, discovered coal on the section in 1881, at a time when there was nobody in the neighboring country except a few men who had been sent up from Newcastle by the Oregon Improvement Co. to hunt for coal. (R., 43.) In 1883 he went again and found coal cropping out. Two years later he was working for that company, and its superintendent, Mr. Williams (father of the witness Sidney J. Williams, R., 49), sent him with three other men (increased to seven or eight in 1884, R., 42) to open up the coal on the section. He thought they were working for the company. (R., 41, 47.) They first drove two tunnels on the northwest quarter, opening in two places a vein of "about the best coal in the country." (R., 41.) About a year later they drove another tunnel on the southeast quarter in "pretty fair" coal, "not quite so good as the coal on the north side of the section." (R., 42.) These two veins ran east and west, with nearly a mile between them. Quite a good many men worked there afterwards. Sugar Loaf Mountain occupies the center and takes in a part of each quarter. There is "quite a piece" of level land on the east side. (R., 42.) Eighteen years ago, and long before that, "everybody up there"—"all the old settlers"—knew the land to be coal land. (R., 43.) A "whole lot" of mines were being operated in that vicinity in 1890, and it was generally known then among the mining men that this was a coal

section. The witness had worked in pretty nearly all of these mines. He was thoroughly acquainted with Turner, who worked for the Improvement Company at Franklin, and later lived for about 12 years at Palmer. Palmer is about 3 miles from section 34. Forsyth worked at the South Prairie mine. (R., 43, 44.)

The timber on the section "don't amount to anything, only just a little piece on the northwest quarter." (R., 44.) There is a piece of pretty fair agricultural land on the east side but the rest "don't amount to much." (R., 45.) This witness is positive in his opinion that the whole section is more valuable for coal than for any other purpose. (R., 47.) He and another man took over 60 tons of coal out of one of the prospect holes in 1886. (R., 49.)

S. D. Fraser (R., 74), who has worked as a practical miner in the county since 1884, visited section 34 in 1885 and at various times since, and worked upon it to some extent. He does not pretend to know all of the veins and workings, but knows a tunnel on the southeast quarter, one on the southwest, and one on the northwest. Has seen three different veins. The coal looked like fair, marketable coal. Turner has been in the vicinity 16 or 17 years—at Franklin, Palmer, and Cumberland. Olsen worked at Kangley, Lawson, and Black Diamond, and has been "in the country" a good many years. Barbee has not been there very long, so far as the witness knows. The section was generally reputed in the vicinity to be coal land.

Earl Evans (R., 75) found indications of coal on the section in 1882. He saw a slope there in 1885 or thereabouts and three or four men working. Has often heard the section called coal land.

N. H. Martin, (R., 92) once an "outside foreman" for the Oregon Improvement Co. at Newcastle, saw coal on section 34 in 1882—a vein of good appearing coal, 4 or 5 feet thick as he recalls, in a prospect tunnel. Visited the section again twice. Some parts of the land were very rough. There was small timber on a good deal of it. Thinks the land unsuitable for agriculture.

Lawrence J. Colman (R., 101) went around the section and over a large portion of it in 1892, while in company with F. H. Whitworth, and testified from notes made at the time. He was one of the persons associated in the Whitworth enterprise and had been upon the land before. He made measurements of dip, strike, and thickness of the coal veins at the excavations visited and took samples which were subsequently analyzed, the results being given in his testimony. (R., 103.) He found a natural exposure of coal, and a prospect hole cut through the vein, at the south quarter corner, an opening into the vein 810 feet farther east and 400 feet north (near the line separating the Forsyth and Turner tracts), and a pit and 10 or 15 feet of tunnel on the vein in the southwest quarter, as well as the workings on the vein in section 33 near the northwest quarter of section 34. (R., 103.) This last vein, "taking into consideration the dip and the strike, would run under this high hill

(Sugar Loaf Mountain) in the center portion of section 34." It contained 64 inches of coal. (R., 104.) The dip varied from 30° to 37° northeast and the strike was south 67½° east. (R., 107.) The vein at the south quarter post showed 84 inches of coal (R., 104), the dip was 23° north, and the strike very nearly east and west. (R., 106.) The vein in the northeast part of the southwest quarter carried 91½ inches of coal. (R., 104.) The dip was 3° to 7° north and the strike was roughly estimated as northwest. (R., 106.)

Though conceding some agricultural and timber value (R., 102), this witness is of the opinion that the land is chiefly valuable for mining (R., 105). He has known of the land as coal land since the early eighties. (R., 106.) He thinks the east half of the east half "good agricultural land," but concludes that the coal deposit which was traced 800 feet to within 500 feet of it extends into it.

Although the Government's witnesses concede that there are parts of the land—particularly on the east side—which are suitable for agriculture, they all concur in stating emphatically that the section as a whole is chiefly valuable for coal. The testimony shows that the timber is for the most part small, unsuitable for lumber, suitable only for lagging, poles, and possibly ties, and of comparatively little value.

The defendant produced three florists, who had recently been brought to the land from a distance to view it and testify concerning its worth for agricul-

ture. (R., 109–115.) They got off the train after noon and boarded it again to go home at 5.10 p. m. the same day. (R., 113.) Their examination, therefore, was confined to a few hours' duration. They approached the section from the southeast, placed foot upon a small part of it, and confessedly based their opinions mainly on the quality of the soil surmised from distant views and the character of the timber. These witnesses did not pretend to know anything of the value of land in that locality or of the possibility of profitable farming under the conditions there existing. They found the land all uncultivated. (R., 110.) The defendant introduced a number of photographs (R., 184 *et seq.*) showing small tracts of open land about the houses of the entrymen, and also revealing the wild nature of the country and the insignificance of the improvements.

C. J. Smith, the vice president and one of the trustees of the defendant (R., 99), and the same person who bought the land as the defendant's agent, was the only other witness called by the defendant to explain its character and value. He testifies (R., 120 *et seq.*) that "there is *some* pretty fair timber." When asked if the timber has any value he says, "Yes. The timber has value. We have had one or two requests to buy timber. I do not know how much there is, because I never had it cruised." He shows, as all the witnesses conceded, that the land has *some* value for timber and agriculture, but carefully abstains from giving any estimate. By this

witness, as well as by the cross-examination of the Government's witnesses, defendant's counsel sought enunciations of the self-evident truth that a property which appears from surface indications to be very valuable for coal may turn out a disappointment after much money has been expended in development. The Kangley mine, for instance, on a contiguous section, is said to have failed because of a hidden dike of igneous rock. But Smith did not allow the defendant to buy the land in controversy until he had satisfied himself "thoroughly well" that that dike did not extend within it. (R., 120.) His testimony, considering what is in it and what is significantly omitted, leaves not the slightest doubt that the company bought only for the coal and only after it had become convinced that the property was a valuable coal property. The expert who made the examination for the company before the purchase (he was not called nor was his report produced) "took some men with him, and in looking over the ground they *uncovered some prospect holes* and *dug out some tunnel* that had been more or less filled with water and débris." (R., 120.) Smith and the company took time to verify the reports of the engineer, and "upon the verification of those reports and the abstract of title the land was purchased."

> Q. You and the company then bought the land for coal land?
>
> A. Yes, after the examination had been made the report was satisfactory. (R., 100.)

Review of the Evidence Relating to Notice.

C. J. Smith was manager of the Oregon Improvement Co. for seven years, from 1891 to about 1898. (R., 98.) That company then owned the Franklin and Newcastle mines (R., 99), and the first of these, as we have seen, was very near to section 34. During his connection with the company Smith visited the Franklin mine from time to time. (R., 99.) The company then, through Smith, was paying out money periodically "for keeping up the coal declaratory statements" on this land by refunding to Mr. Howard "the expense, a portion of the expense that he was paying for some people exploring and locating our land." (R., 118.) This refers, of course, to the operations and filings of the Whitworth-Howard "syndicate." There are divers letters and other documents in the record—files of the Oregon Improvement Co. (R., 94 *et seq.;* 180 *et seq.*), which prove that Smith, as general manager and later as receiver also, was informed that this section was being "held" as coal land, in part for the company, and that he inquired into the value of the land and afterwards, as late as 1897, authorized payment of the company's share of the expenses. Under date of November 8, 1890, Howard writes Smith (R., 180) that—

> at the conclusion of a fight * * * growing out of an error of our mining superintendent, I was enabled to get from Smithers and Whitworth a declaration that I had a one-third interest in section 34 of the township north of

> the one in which Franklin mine was situated. * * * It was then regarded as a valuable section and for a long time afterwards we were figuring upon an extension of our lines in its direction. It is unsurveyed land and requires to be held. Various reports have been made to me about its value—some favorable, some otherwise. We have been contributing one-third of the expense of holding it. When Mr. McNeill first came to Seattle I asked him to have it examined and pass final judgment on it. If it be good, we want to keep it, otherwise we want to let it go. I have several times written him to advise me regarding it, but he has never replied. During my last visit to Seattle he promised to send Mr. Corey to make a report on it, but I have as yet heard nothing. Will you please take the matter up and advise me whether the company should longer contribute toward the cost of maintaining possession?

In a letter of December 8, 1890 (R., 181), Howard again calls Smith's attention to the matter, and asks him to pass upon it.

December 9, 1890, Smith writes to McNeill (R., 182):

> Please let me know what you think of section 34 *marked on the map* in the name of J. L. Howard. Is there anything in it, or have you ever made any examination of it?

January 13, 1897, Whitworth writes to Howard (R., 183), inclosing an account of the expenses of section 34 for two years, and saying: "Don't you want to buy out some or all of our interests * * *

or do you know of anyone else who wants to buy a good section of coal cheap?"

That the account and letter were both brought to the attention of Smith is established by the voucher approved by him, as receiver and general manager (R. 184), "For amount advanced to cover expenses in refiling, etc., on section 34, in 1895 and 1896, as per letter of F. H. Whitworth to Jno. L. Howard, dated 1/13/97, attached."

This was only three years before the making of the Turner entry.

Smith bought this land for the defendant in 1906. (R., 116.) Some months before he was approached by a Mr. Brooks, who had an option on it and wanted to sell. (R., 117.) Smith first referred him to a Mr. Collins, "who had been looking for coal lands."

> And a month or something of that sort elapsed—I do not remember how long—and Mr. Brooks came to me and told me that Mr. Collins had given it up, and his option was about to expire, and in the meantime this Washington Securities Co. had been virtually formed—the formation of it had been virtually agreed upon, but the organization had not been perfected, and I referred him to the Washington Securities Co., and on the discussion of the matter with the president of the company at that time he agreed to look into the matter if I would have an examination made of the property and see whether there was any coal on it, and I sent a man up there, who spent some considerable time looking over the property and making

> the examination, and it was upon his report that the president of the company agreed to purchase it, but the company not being formed at that time he requested that I take the title in my name and transfer it to the company when the legal organization of the company was perfected.

Smith does not pretend that at this time he had forgotten the Whitworth-Howard transactions and correspondence. His nearest approach to it is to say that when Brooks first approached him he told Brooks that he did not know about the section, but that when Brooks described it with reference to the Franklin, Kangley, and other adjacent mines, he told Brooks that he had an indistinct remembrance that it had been brought to his attention some years before; that he had never seen any report or examination of it, was not aware of its value, did not know whether it was coal or not, and did not care to go *any further* with it; "that was as to myself personally." But when the defendant company was formed he referred it to them. (R., 119.) This witness denies that he knew the value of the property, and the existence of tunnels upon it, etc., but he does not deny that the facts which he learned while general manager and receiver of the Oregon Improvement Co. were present to his recollection when he made the purchase.

He denies that he knew the land had been homesteaded when Brooks first came to him, but he does not deny that he knew it or that other representatives

of the defendant knew it before the purchase was made. An abstract of title was procured and the title was examined by the company's attorney, Mr. H. R. Clise. (R., 118.) Such an examination could not well have failed to reveal the fact that patents had issued under the homestead law. The recitals in the patents would have shown it.

Smith was not merely an agent of the defendant company. He was one of its promoters, one of the original subscribers for its shares, and one of its trustees, as well as its vice president, upon its organization. He made the purchase with the company's funds. (R., 99.)

The defense of *bona fide* purchase was not made in the answer, which contains merely denials and admissions of matters averred in the bill. Neither do the bill and the answer combined present this issue fully. The record does not show the character or value of the consideration or the time when it passed.

ARGUMENT.

I. The patents were illegally issued.

1. *Since this question depends entirely upon the facts, the finding of the courts below is conclusive, in the absence of clear error.*
2. *The finding of the courts below was sustained by ample evidence.*
   (*a*) The land was known coal land, and therefore reserved by law from homestead entry.

(*b*) There was fraud in the entries; the entrymen knew, or were chargeable with knowledge, of the character of the land.

(*c*) The patents were unlawful even though the entrymen were honestly mistaken.

II. The defendant has not sustained the defense of bona fide purchase.

1. *The burden was upon the defendant to allege and prove clearly all the elements of this defense.*
2. *The defense was neither pleaded nor proven by the defendant.*
3. *The evidence shows affirmatively that the defendant was on notice of the illegality of the patents when the purchases were made.*

(*a*) This is a question of fact.

(*b*) The defendant was notified that the land had been entered and patented under the homestead law.

(*c*) It knew the character of the land when it purchased.

(*d*) It knew or was notified that the mineral character was known before the entries were made.

(*e*) The information which Smith, the defendant's agent, had previously acquired was imputable to the defendant; the inference that it was present to his mind when the purchase occur-

red is supported by the evidence; but the notice to the defendant flowed also, independently, from the other facts attending the purchase.

III. There was no conclusive adjudication of the character of the land in the Land Office proceedings.

I.

The patents were illegally issued.

1. *Since this question depends entirely upon the facts, the finding of both courts below is conclusive, in the absence of clear error.*

Texas & Pacific Ry. Co. v. *Railroad Commission*, No. 186, October term, 1913.

Chicago Junction R. Co. v. *King*, 222 U. S., 222.

Dun v. *Lumbermen's Credit Ass'n*, 209 U. S., 20.

2. *The finding of the courts below was sustained by ample evidence.*

(*a*) *The land was known coal land, and therefore reserved by law from homestead entry.*

The answer admits that the land at the time of entry contained, and still contains, "*valuable workable deposits of coal.*" (R., 9.) This admission applies to all of the tracts entered and is enough in itself to sustain the proposition that the homestead law was inapplicable. *Diamond Coal & Coke Co.* v. *United States*, No. 192, October term, 1913.

The evidence establishes clearly that the land was known to be more valuable for coal than for any

other thing. There can be no doubt of the correctness in this respect of the finding of the courts below. Without contradiction the proofs show:

That this land was part of a coal-bearing and coal-producing region; that there were many operating mines in the vicinity, some of them quite near; that the land was generally believed and reputed to be coal land, particularly among the inhabitants who were interested in coal mining (and the record affords no ground for supposing that there were many who were not); that for years before the filings were made much labor and money had been expended in opening up the coal veins upon and immediately adjacent to the section; that a large vein of merchantable coal had thus been conspicuously revealed upon the Forsyth tract (W. ½ of E. ½) near the center of the south line of the section, and again near the east boundary of that tract, under circumstances justifying the conclusion that it must penetrate the Barbee tract (SW. ¼) on the one hand and the Turner tract (E. ½ of E. ½) on the other; that another large vein of merchantable coal had been in like manner revealed in the northeast part of the Barbee tract under circumstances indicating that in all probability it must exist in the Olsen tract (NW. ¼) also; that a third large vein of merchantable coal, trending directly toward and presumably traversing the Olsen tract, had been opened to sixty feet from his west line; and that there were still other veins upon the section which had not been so well exposed.

The Government's witnesses were unanimously of the opinion that the section was chiefly valuable for its coal, and this evidence also was not only uncontradicted but was firmly corroborated by the answer and by the conduct of the defendant in purchasing the land as coal land after a careful expert examination, without apparent thought of its value in other respects—an examination which proceeded upon the facts which existed and were patent before the entries occurred.

While the evidence concerning the tract entered by Turner was not quite so strong as that in the other cases, because there was more level land there, and the coal was not actually opened upon it, only five hundred feet separated this tract from the tunnel and slope on the Forsyth tract, and there is abundance of evidence to justify the inference that the same vein, if not others also, extended into the Turner land. The formation was apparently unbroken, and the dip and the strike were such as to require the inference that, assuming a continuity of the deposit which there was no reason to doubt, the coal could readily be found and developed there as it was within the Forsyth entry. This was a large vein of good coal, and the probability of its presence must have made the acquisition of the Turner tract exceedingly important to anyone desirous of acquiring and operating the remainder of the section for coal production.

The homestead law declares "nor shall *any* mineral lands be liable to entry and settlement under its provisions." (R. S., 2302.) "In all cases *lands val-*

uable for minerals shall be reserved from sale," etc. (R. S., 2318.) "Vacant coal lands of the United States" are subject to entry under the coal-land law. (R. S., 2347.)

> To justify the annulment of a homestead patent as wrongfully covering mineral land, it must appear that at the time of the proceedings which resulted in the patent the land was known to be *valuable for mineral;* that is to say, it must appear that the known conditions at the time of those proceedings were plainly such as to engender the belief that the land contained mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end. (*Diamond Coal & Coke Co.* v. *United States, supra.*)

In view of these statutory and judicial declarations, it is submitted that the fact that the land in this case had, in parts, some value for timber and some value for agriculture, is immaterial to its status as coal land, purchasable under the coal-land law and not purchasable under the homestead law. Nearly always land valuable for coal or other minerals will be found valuable in some degree for cultivation, grazing, timber, or other purposes also. But its status does not depend upon a comparison of these values. If it is valuable for coal, it is mineral land, no matter how valuable it may be in other aspects, and the higher (coal land) price must be paid by the purchaser.

But even if this were otherwise, it is manifest from the record that the timber and agricultural values

in this case were indefinite, never seriously considered, and not to be considered in comparison with the coal value, which even the defendant by its conduct, its admissions, and its silence has conceded to be the principal value.

(*b*) *There was fraud in the entries; the entrymen knew, or were chargeable with knowledge, of the character of the land.*

As the land was reserved by law as mineral land, the local land officers committed plain error in allowing the homestead entries. That the error is attributable to the false representations contained in the homestead papers concerning the character of the land is not to be disputed. If those representations had not been made, and *a fortiori*, if the true facts had been revealed, the entries would never have been allowed and the patents would never have been issued. Hence the purposes of the entrymen are immaterial. It is not even necessary to inquire closely whether they were honest or dishonest. If they knew the facts, they were guilty of a wilful fraud. If they did not know them, the error of the land department in issuing homestead patents for land reserved by law is directly attributable to their reckless asseverations of what was clearly untrue.

But if proof of wilful fraud be necessary, there is proof in this record. The reputation of the entire section as coal land had been notorious for years, especially among people interested in coal mining. It was in the midst of a coal mining region, with

active coal mines in close proximity. The exposures of coal were patent on the surface. All of the entrymen had been employed as coal miners, or in connection with coal mining operations, by one or more of the local coal companies, so that all must have had peculiar knowledge of the *indicia* of coal deposits and of their probable value in that region. Their incentive to take up the land for coal is evident, while an incentive to take it for agriculture is quite improbable. They made insignificant improvements, cultivated slightly, or not at all, commuted promptly, and sold the land as coal land not long after patent. The idea that these men were not aware of the presence of the coal is wholly incompatible with the evidence in the case and with their sworn assertions that they had been over the land and knew it.

Furthermore, there is direct evidence that Turner, Forsyth, and Barbee were all warned while their entries were pending, or before, and that one of them, Forsyth, admitted that he had been sent there to file. All four, with the possible exception of Turner, were presumably impecunious, and it is unlikely, to say the least, that men of their calling and circumstances would have come to this wild land and found and expended the funds necessary to commute the entries merely because of such doubtful agricultural possibilities as the evidence reveals.

They all commuted their entries to hasten the titles as soon as the law would permit it, or not very much later, and sold the land as coal land a few

years after the patents had issued, the evidence of coal value at the time of sale being none other than that which had existed before the entries were made.

If these entries were honest, why did not the defendant call the entrymen and their proof witnesses, or at least some one of them, to explain away the damning circumstances?

Upon the whole we submit that to say that the courts below were *clearly wrong* in their view of the evidence would be absolutely unwarranted.

(c) *The patents were unlawful even though the entrymen were honestly mistaken.* Even if it were possible to believe that the entrymen were all honestly mistaken, the result would be the same. The legal right to issue the patents depended on the character of the land, and not upon the state of the entrymen's minds. *Mullan* v. *United States,* 118 U. S., 271, 278.

II.

The defendant has not sustained the defense of bona fide purchase.

1. *The burden was upon the defendant to allege and prove clearly all the elements of the defense.*

In *Boone* v. *Chiles* (10 Pet., 177, 211) this court, with many citations of authorities which we here omit, expressed itself as follows:

> The protection of such *bona fide* purchase is necessary only when the plaintiff has a prior equity; which can be barred or avoided only by the union of the legal title with an equity aris-

ing from the payment of the money and receiving the conveyance without notice and a clear conscience. It is setting up matter not in the bill; a new case is presented, not responsive to the bill; but one founded on a right and title operating, if made out, to bar and avoid the plaintiffs' equity, which must otherwise prevail. The answer setting it up is no evidence against the plaintiff, who is not bound to contradict or rebut it. It must be established affirmatively by the defendant independently of his oath. In s tting it up by plea or answer, it must state the deed of purchase, the date, parties, and contents briefly; that the vendor was seized in fee and in possession; the consideration must be stated, with a distinct averment that it was *bona fide* and truly paid, independently of the recital in the deed. Notice must be denied previous to and down to the time of paying the money and the delivery of the deed; and if notice is specially charged, the denial must be of all circumstances referred to from which notice can be inferred and the answer or plea show how the grantor acquired title. The title purchased must be apparently perfect, good at law, a vested estate in fee simple. It must be by a regular conveyance; for the purchaser of an equitable title holds it subject to the equities upon it in the hands of the vendor and has no better standing in a court of equity. Such is the case which must be stated to give a defendant the benefit of an answer or plea of an innocent purchase without notice; the case stated must be made out; evidence will not be

permitted to be given of any other matter not set out.

See also:

McDonald v. *Belding*, 145 U. S., 492, 498.
Smith v. *Orton*, 131 U. S., Appendix LXXV, LXXVIII.
Simmons Creek Coal Co. v. *Doran*, 142 U. S., 417, 437.
Johnson v. *Georgia, &c., Co.*, (C. C. A.), 141 Fed., 593.
Secombe v. *Campbell* (C. C.), 2 Fed., 358.
Nickerson v. *Meacham* (C. C.), 14 Fed., 884.
Lakin v. *Sierra Buttes G. M. Co.*, 25 Fed., 337, 342.
Jewett v. *Palmer*, 7 Johns. Ch., 64.
Rozell v. *Chicago Mill & Lumber Co.*, 76 Ark., 525, 527.
39 "Cyc", 1778 *et seq.*

2. *The defense was neither pleaded nor proven by the defendant.*

Since this defense was treated by both sides as being in the case, we will pass over the absolute failure of the defendant to plead it, but the failure to prove it is quite another matter. The character of the consideration, its value, and the time when it passed are not shown. Notice was not disproved; on the contrary, the evidence establishes affirmatively that notice existed.

3. *The evidence shows affirmatively that the defendant was on notice of the illegality of the patents when the purchases were made.*

(*a*) This matter of notice comes down to a mere question of fact, concerning which the conclusion of

the courts below should be accepted unless clearly wrong.

(*b*) Conceding that, generally speaking, it is not incumbent on the purchaser of patented land to inquire into the proceedings before patent, it must also be conceded as a self-evident proposition that he is charged with notice of the recitals contained in the patent itself.

> Apart from this we hold appellant chargeable with notice. The rule is thus stated by the Virginia Court of Appeals in *Burwell's Adm'rs* v. *Fauber* (21 Gratt., 446, 463): "Purchasers are bound to use a due degree of caution in making their purchases, or they will not be entitled to protection. *Caveat emptor* is one of the best settled maxims of the law and applies exclusively to a purchaser. He must take care and make due inquiries or he may not be a *bona fide* purchaser. He is bound not only by *actual* but also by *constructive* notice, which is the same in its effect as actual notice. He must look to the title papers under which he buys and is charged with notice of all the facts appearing upon their face or to the knowledge of which anything there appearing will conduct him. He has no right to shut his eyes or his ears to the inlet of information and then say he is a *bona fide* purchaser without notice. *Simmons Creek Coal Co.* v. *Doran*, 142 U. S., 437.

This court knows without proof that all patents by the Government contain recitals of the law under which they are issued, and, specifically, that such recitals are contained in all patents issued under the

homestead law and in all patents issued under the coal-land law.

The defendant does not deny that it knew the patents in question were homestead patents. It is proven that it had an abstract (Smith had it himself; R., 118) and that the title was examined by its attorney before purchase. Smith does not remember whether this attorney was one of the directors or not (R., 118), but at all events notice to the attorney was notice to the defendant.

39 Cyc. 1763, note 96.
Amstrong v. *Ashley*, 204 U. S., 272.
Jennings v. *Carter*, 53 Ark., 242.
Stokes v. *Riley*, 121 Ill., 166, 174.
Griffith v. *Griffith*, 9 Paige, 315.
Sickles v. *White*, 66 Tex., 178, 179.
Polk v. *Cosgrove*, 4 Biss., 437.
Griffin v. *Franklin*, 224 Mo., 667, 683.

Hence there can be no question but that, before purchase, the defendant was notified that the patents were the results of homestead entries. If this was not so, it would have been easy for the defendant to show the contrary and, as we have seen, it was its duty to produce the proof.

(*c*) The defendant knew before purchase that the land was coal land. It took care to obtain in advance an examination and report by an expert, and then purchased the land for coal mining.

(*d*) The only possible question is whether the defendant knew, or was notified, that the presence of

the coal was known or knowable before the final entries were made.

In view of the wholesale and outrageous frauds which have been committed against the public domain in this country, we seriously doubt whether this court would be inclined to hold that a person knowing that a tract of land was patented under the homestead law and believing it to be very valuable for coal would be under no duty to inquire into the validity of the entries. Such a ruling would open too easy a market for fraudulent titles, exact too little diligence of purchasers, invite collusion, and add unnecessarily to the burden, already too great, of protecting the public land and enforcing the public-land laws. But that is not this case. The defendant's engineer admittedly saw the natural outcroppings and the old developments; he must have reported them to the company; they must have furnished the principal bases for his opinion and for the company's decision to buy. Smith, who was the *alter ego* of the company in the purchase, admits that old workings were discovered, and that he satified himself "thoroughly well" about the dyke before he would take the property. (R., 120.) Smith, owing to his former connection with the Improvement Company, during which he was accustomed to visit the Franklin mine (R., 99), must have had considerable knowledge of the region and its history. He could readily have ascertained the origin of these old workings. Even a superficial investigation would have informed him,

if he did not know already, that the section was known and reputed to be coal land and that the prospects and tunnels had existed years before the entries were made.

(*e*) Smith also had obtained knowledge of the section while he was general manager and receiver of the Oregon Improvement Company. As late as 1897 he authorized the use of that company's funds to pay for "assessments" and filing fees. (R., 184.) According to his letter to his predecessor, McNeill (R., 182), the whole section was "marked on the map" (evidently a map of the company) "in the name of J. L. Howard." Undoubtedly he must have been a party to the scheme to acquire this land, in whole or in part, for the company, lawfully or unlawfully, under the coal-land law, if it seemed worth while to do so.

> The rule that notice to the agent is notice to the principal applies not only to knowledge acquired by the agent in the particular transaction, but to knowledge acquired by him in a prior transaction and present to his mind when he is acting as such agent. *The Distilled Spirits,* 11 Wall., 356.

Now it is insisted by the appellant that the knowledge thus acquired had vanished from Smith's mind when he came to purchase for the defendant less than 10 years later (not 16, as it is stated in the opposing brief, p. 24). In view of the full discussion of this matter contained in the opinion of the Circuit Court of Appeals (R., 203–206), we will not

expend space upon it. It is enough to say that the contention is most improbable on its face and that it appears by the testimony of Smith himself that, before he bought, his memory had been refreshed concerning his former relations to this section. The effect of all the evidence on this question, direct and inferential, was weighed by the courts below and determined against the defendant. This was purely a finding of fact for which there was justification, if not compulsion, in the evidence, and which, therefore, is not a proper subject for reexamination.

But the case does not depend upon the notice which Smith acquired in the earlier years. Without regard to that, he and the defendant were put upon inquiry at the very time of examination and purchase, as we have indicated above.

III.

There was no conclusive adjudication of the character of the land in the Land Office proceedings.

The facts upon which the defendant relies in this connection are, first, that it appears by the Land Office papers that the progress of Turner's entry was for a time delayed by a "coal protest" which was dismissed by the Commissioner of the General Land Office in October, 1902 (R., 177), and by some expired coal declaratory statements which the commissioner canceled in August, 1903 (*ib.*), and, second, that it appears by the testimony that some effort was made through Whitworth and Sidney Williams to oppose final proofs before the local office (R., 83,

52, 53, 59). Whitworth says (R., 83) that after the homestead filings had been made, he and others not named, having been notified by that office that they "must show from recent examination the character of the land," made application "to have the Government take it in hand and give us an opportunity of showing the character of the land, but they refused." He does not say that he made any coal filing or protest, or that the matter was followed up in any way. Williams says that, after the initial homestead entries had been made, he filed on a quarter section including the Forsyth tunnel (R., 53), or went to the office to make such a filing (R., 59). He tendered the coal price, and produced witnesses to prove the coal character. But he did not contest the Forsyth entry (R., 59); there was no hearing, no evidence was introduced, no witnesses were examined, and the land officers simply refused the money, "stating that there had been a contest filed" (*Ib.*). He also says that they "held it was more valuable for other purposes, and gave me back my money." (R., 53.) He did nothing further, but "just let the matter drop." (R. 59.) Whether the protest and declaratory statements mentioned in the Land Office papers were related to these abortive proceedings does not appear; probably they were not, since they affected the Turner entry only.

One fact stands out clear from all this uncertainty, and that is that whatever filings or objections were made were abandoned. There is nothing to demonstrate that any proof was offered in such form as to

justify the officers in receiving it or in delaying the homestead proceedings. When the first homestead papers were filed, the register certified that the land was free from "prior valid adverse right." (R., 124, 136, 150, 164.) Williams's attempt to file was evidently after the initial homestead entry and before or after final proof. Of course, under those circumstances, the filing could not be allowed or his money received. If he desired to attack the homestead entries, his recourse was to file a contest or protest and follow it up by proofs. This he did not do, and in its absence, neither the local officers nor their superiors had anything before them to adjudicate, save to dismiss any protest which was not prosecuted diligently according to the rules.

The most that can be said is that in some informal and ill-defined way the attention of Government officials was called to the possibility that the land was coal land and to the desire of third persons to purchase it as such. According to the degree of certainty and reliability of the information thus afforded, it might or might not have been the duty of the land officials to suspend the homestead entries for further investigation. The duty, if it existed, was a duty to the Government alone. It is little short of absurd to argue that the unlawful neglect of such a duty amounts to a lawful *adjudication* establishing conclusively the nonexistence of the facts which would have been disclosed if the duty had not been neglected. If the defendant's position were sound, every fraudulent patentee could defeat a suit of this kind by show-

ing that in some way the register of the land office was put on notice of his fraud.

Here the defendant stands precisely in the shoes of its grantors. If they could not have complained of the refusal of Government officials to probe the truth of their representations at the instance of outsiders, the defendant may not be heard to do so.

It is quite evident that opposing counsel confuse adjudication with failure to adjudicate. There is fallacy also in their assumption that an actual adjudication in a contest between private claimants would necessarily estop the Government. Doubtless it may be true that when the validity of a patent depends upon facts whose existence the department is authorized to determine, and when the evidence produced against the patent in a suit for cancellation is conflicting, and is substantially the same as the evidence considered by the department before the patent issued, the finding of the department should be held conclusive by the court. This would be no less true of an *ex parte* proceeding than of one in which a protest or contest was present. The specialty of the department's function in determining the facts which lead to patents imports finality when the function has been fully exercised in the manner contemplated by the law, but when such exercise has been prevented by fraud or mistake, so that a patent goes forth in violation of the law, it becomes the duty of the courts to set aside the patent, because the department can not do this itself nor deal further with the land while the patent remains outstanding.

See—

United States v. *Stone*, 2 Wall., 525.
Mullan v. *United States*, 118 U. S., 271.
Germania Iron Co. v. *United States*, 165 U. S., 379.
Williams v. *United States*, 138 U. S., 514.

A patent procured by false representation is unlawful not merely in the sense that every conveyance, whether by the Government or an individual, which results from a violation of the principles of fair dealing, is unlawful; it is unlawful also because the law does not justify the issuance of any patent in the absence of a proper inquiry and determination of the facts upon the existence of which the right to the conveyance is made to depend by the statutes. Hence it is that mere notice to a Government agent, such as would bind a private person in respect of his own property, can not affect the Government, since the law does not contemplate that notice shall take the place of inquiry or allow its own operation to depend upon the diligence or honesty of its servants. Hence, also, no protest or contest or other proceeding before the department which fails to disclose and evoke a determination upon the evidence of fraud can be accepted as a reason why that evidence should be denied its normal consequence when revealed to a court of equity. Especially must this be so when the contest or protest is the affair of a private claimant unauthorized in any way to represent the Government, and under no duty to protect its rights.

CONCLUSION.

Bona fide purchasers, when truly such, are rightly the favored of equity. This ground of defense, however, is one that lends itself with peculiar facility to collusion and fraud. Only by constant insistence upon diligent inquiry may the equities of defrauded owners be protected, and only by demanding the greatest particularity of proof upon the part of purchasers may the imposters be distinguished from the worthy. It is no hardship to exact of a purchaser that he shall have been careful to follow up all clews to wrongdoing before he bought, and that afterwards he shall stand ready to allege and prove with fullness and particularity all that he did and all that he knew about the title. In the performance of these duties the defendant has failed most signally. The evidence which it produces is incomplete and evasive. Other evidence, documentary and oral, which might have been produced and which would have shed much additional light upon the question of the defendant's good faith, is withheld without excuse. The case is lacking in that frankness and fullness of disclosure which should always characterize the defense of a *bona fide* purchaser, and the evidence, as it stands, certainly justifies, if it does not require, the conclusion that the defendant was not such a purchaser.

It is respectfully submitted that there is no proper reason to disturb the finding of the courts below.

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